

No. 12323

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United States  
Court of Appeals  
for the Ninth Circuit.

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EARL A. ERNST,

Appellant,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.  
CLEMENS and H. G. McBRIDE, doing busi-  
ness as IDEAL MANUFACTURING COM-  
PANY,

Appellees.

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SUPPLEMENTAL  
Transcript of Record

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Appeal from the United States District Court,  
Southern District of California,  
Northern Division.

FILED

FEB 13 1933

PAUL P. O'BRIEN,

CLERIC



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Appeal from the United States District Court,  
Southern District of California,  
Northern Division.



PLAINTIFF'S EXHIBIT NO. 5

United States District Court, Southern District of  
California, Northern Division

Civil Action No. 721-ND

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.  
CLEMENS and H. G. McBRIDE, doing busi-  
ness as IDEAL MANUFACTURING COM-  
PANY,

Defendants.

PLAINTIFF'S INTERROGATORIES

Plaintiff propounds interrogatories to the defend-  
ants and each thereof, pursuant to Rule 33 of the  
Federal Rules of Civil Procedure, as follows:

I.

Have you made, sold or used, since June 30, 1942,  
a device for unloading belt conveyors including an  
endless belt, roller means over which such belt ex-  
tends for supporting it, mechanism for rotating the  
roller means, a pair of spaced bars longitudinally  
of the belt and substantially the length thereof,  
said bars being spaced above and substantially over  
the longitudinal edges of the belt, an element slid-  
able on each bar having attached coupling means to  
hold a plate, a plate having a portion of its ends

## Plaintiff's Exhibit No. 5—(Continued)

connected to the coupling means, said coupling means forming an acute angle with said slidable elements so that the plate is positioned obliquely across the belt.

## II.

If your answer to Interrogatory I is in the negative describe the construction and operation of the device or devices for unloading belt conveyors which you have made, used or sold since June 30, 1942.

## III.

Have you made, sold or used a device for shaking containers and the like to settle the contents thereof, including a frame, a platform for supporting a plurality of containers, hinged means supporting the platform from the frame, vibrating means connected to the platform for shaking it and the containers supported thereby, said means including a pitman adjacent the platform, coupling means connecting the pitman with a portion of the platform, and rotary means attached to the pitman for reciprocating it, said platform including an elongated surface with container stations from the ends thereof to a central open locus, said vibrating means having its connection with the platform at said central locus.

## IV.

If your answer to Interrogatory III is in the

## Plaintiff's Exhibit No. 5—(Continued)

negative, describe the construction and operation of the device or devices for shaking containers or the like to settle the contents thereof, which you made, used or sold prior to the filing of this suit.

## V.

If your answer to Interrogatory III is in the affirmative state the date or dates when you made, sold or used one or more of the devices as described in said Interrogatory III.

## VI.

If you have answered Interrogatory IV, as required, state the date or dates when you made, used or sold one or more of the devices described in said interrogatory.

## VII.

Attached hereto, and marked Plaintiff's Exhibit 1, is a photograph of a part of a sacking device, taken from one side of said device, showing a baffle plate or shearer of said device.

State whether you have made, used or sold a sacking device, prior to the filing of this suit, containing a baffle plate or shearer as shown in said Exhibit 1.

## VIII.

If your answer to Interrogatory VII is in the negative please attach a photograph or drawing to

## Plaintiff's Exhibit No. 5—(Continued)

your answers to these interrogatories, showing the construction of the baffle plate or shearer of the sacking device or devices which you have made, sold or used since June 30, 1942, and explain said baffle plate or shearer.

## IX.

Attached hereto and marked Plaintiff's Exhibit 2, is a photograph of a part of a sacking device, taken from the side of the device opposite the side from which Exhibit 1 was taken and showing the baffle plate or shearer shown in said Exhibit 1.

State whether you have made, sold or used a sacking device containing a baffle plate or shearer as shown in said Exhibit 2.

## X.

If your answer to Interrogatory IX is in the negative please attach to your answers to these interrogatories a photograph or drawing showing the construction of the corresponding side of the baffle plate or shearer of the sacking device or devices which you have made, used and/or sold since June 30, 1942.

## XI.

Attached hereto and marked Plaintiff's Exhibit 3-3 is a photograph of a portion of one side of a sack jigger showing the mechanism for vibrating or jiggling the platform for supporting the sacks.



## Plaintiff's Exhibit No. 5—(Continued)

State whether you have made, used or sold a sack jigger, prior to the filing of this suit, containing the mechanism for vibrating or jiggling the platform for supporting the sacks, as shown in said Exhibit 3-3.

## XII.

If your answers to Interrogatory XI is in the negative, please attach to your answers to these interrogatories a photograph or drawing showing the construction of the mechanism for vibrating or jiggling the platform for supporting the sacks of the sack jigger which you made, used or sold prior to the filing of this suit.

## XIII.

If your answer to Interrogatory I is in the negative, identify each element or feature specified in said interrogatory that is absent from the sacking devices made, used or sold by you.

## XIV.

State where each specific element or feature of claim 1 of the patent in suit, No. 2,288,159, is disclosed in each item of the prior art to be relied upon at the trial, to the full extent that it will be contended that the prior art makes any such disclosure.

## XV.

If your answer to Interrogatory III is in the negative, identify each element or feature specified

Plaintiff's Exhibit No. 5—(Continued)  
in said interrogatory that is absent from the sack  
jigger made, used or sold by you.

XVI.

State where each specific element or feature of  
claim 1 of Patent, Re 22,740, is disclosed in each  
item of the prior art to be relied upon at the trial,  
to the full extent that it will be contended that the  
prior art makes any such disclosures.

XVII.

State what patents and/or publications will be  
offered in evidence at the trial by defendants to  
illustrate the prior state of the art.

XVIII.

State who made the parts for the sacking devices,  
and/or attachments therefor, used by defendants in  
their factory, and when they were made.

XIX.

If the sacking devices and/or attachments there-  
for were constructed by defendants in their own  
factory give the names of the persons who assembled  
or constructed such devices and/or attachments.

XX.

State who made the parts for the sack jiggers  
and/or attachments therefor used by defendants in  
their factory, and when they were made.

Plaintiff's Exhibit No. 5—(Continued)

XXI.

If the sack jiggers and/or attachments therefor were constructed by defendants in their own factory, give the names of the persons who assembled or constructed such devices and/or attachments.

XXII.

State in detail the alleged intervening rights, alleged in Paragraph X of the Answer, to have accrued in favor of the defendants as against the plaintiff, between the date of the grant of the original Letters Patent No. 2,347,474 and the date of application of the alleged Re-issue Letters Patent No. 22,740, giving dates, names of places and names, and addresses of persons alleged to have established such intervening rights.

Dated: Los Angeles, California, December 8, 1948.

/s/ ALAN FRANKLIN,  
Attorney for Plaintiff.

[Endorsed]: Filed December 9, 1948.

## PLAINTIFF'S EXHIBIT NO. 6

United States District Court, Southern District of  
California, Northern Division

Civil Action No. 721-ND

EARL A. ERNST,

Plaintiff,

vs.

A. G. CLEMENS and H. G. McBRIDE, and A. G.  
CLEMENS and H. G. McBRIDE, doing busi-  
ness as IDEAL MANUFACTURING COM-  
PANY,

Defendants.

DEFENDANTS' ANSWERS TO PLAINTIFF'S  
INTERROGATORIES

Defendants give the following answers to inter-  
rogatories propounded by the plaintiff under Rule  
33 of the Federal Rules of Civil Procedure:

I.

Interrogatory: Have you made, sold or used, since  
June 30, 1942, a device for unloading belt conveyors  
including an endless belt, roller means over which  
such belt extends for supporting it, mechanism for  
rotating the roller means, a pair of spaced bars  
longitudinally of the belt and substantially the  
length thereof, said bars being spaced above and  
substantially over the longitudinal edges of the belt,

## • Plaintiff's Exhibit No. 6—(Continued)

an element slidable on each bar having attached coupling means to hold a plate, a plate having a portion of its ends connected to the coupling means, said coupling means forming an acute angle with said elements so that the plate is positioned obliquely across the belt.

Answer: No.

## II.

Interrogatory: If your answer to Interrogatory I is in the negative describe the construction and operation of the device or devices for unloading belt conveyors which you have made, used or sold since June 30, 1942.

Answer: The apparatus manufactured and sold by defendants since June 30, 1942, which most nearly corresponds to the description in Interrogatory I may be briefly described as follows:

Form 1. An endless belt stretched between oppositely disposed parallel rollers with power means to drive one of the rollers is adapted to convey potatoes or any other articles which are to be moved from one location to another and to be diverted at selected stages into containers or for further handling. The diversion is accomplished by a shear plate positioned diagonally across the belt. This plate is suspended from a pair of rods located above the belt somewhat shorter than the belt. A trolley comprising two pairs of sheaves mounted in a framework is arranged for rollable travel on each

## Plaintiff's Exhibit No. 6—(Continued)

of the rods. From the framework vertically depends a suspension member, the lower end of which is bolted to the shear plate. A vertical slot is provided in the suspension member so that the elevation of the shear plate may be adjusted. A latch arrangement is associated with the trolley for releasably securing the trolley at any one of various selected positions along the rods.

Form 2. This form is identical to Form 1, except that only one overhead rod and trolley association is employed. On the opposite side a horizontal track is formed as a part of a steel plate extending alongside the belt as an element of table framework upon which the rollers and associated mechanism are supported. On this track for rolling movement is a sheave and axle which connects with one end of the shear plate.

## III.

Interrogatory: Have you made, sold or used a device for shaking containers and the like to settle the contents thereof, including a frame, a platform for supporting a plurality of containers, hinged means supporting the platform from the frame, vibrating means connected to the platform for shaking it and the containers supported thereby, said means including a pitman adjacent the platform, coupling means connecting the pitman with a portion of the platform, and rotary means attached to the pitman for reciprocating it, said platform in-



## Plaintiff's Exhibit No. 6—(Continued)

cluding an elongated surface with container stations from the ends thereof to a central open locus, said vibrating means having its connection with the platform at said central locus.

Answer: No.

## IV.

Interrogatory: If your answer to Interrogatory III is in the negative, describe the construction and operation of the device or devices for shaking containers or the like to settle the contents thereof, which you made, used or sold prior to the filing of this suit.

Answer: Apparatus manufactured and sold by the defendants which most nearly corresponds to the language of Interrogatory III has been in two forms which may be briefly described as follows:

Form 1. It is an apparatus for shaking bags or the like to settle the contents thereof, primarily while the bags are being filled. Such apparatus necessarily embodies a frame. It incorporates a pair of parallel traveling belts to convey articles from a remote location for distribution. At the delivery end of the traveling belt is a twin distributing apparatus as described in answer to Interrogatory II, both forms having been employed. Each twin unit comprises in addition to the elements described in answer to Interrogatory II a plank, or platform or table hingedly mounted upon the framework, this plank being suitable for the

## Plaintiff's Exhibit No. 6—(Continued)

positioning thereon of a plurality of bags or other containers. A shaking means is provided in the form of an electric motor driving an eccentric which is coupled with a connecting strap, the opposite end of which is attached to the near end of the plank. The same motor and eccentric are utilized for powering both connecting straps and consequently reciprocating both planks or platforms.

Form 2. This form of apparatus is identical with the apparatus of Form 1 except that the inner ends of the two planks or platforms which remain separated as before are fixedly interconnected by a rigid strap or bar. The motor and eccentric mechanism are located at one extreme end of the aligned platforms instead of between them and a single connecting strap communicates reciprocatory motion from the eccentric to the adjacent platform end.

## V.

Interrogatory: If your answer to Interrogatory III is in the affirmative state the date or dates when you made, sold or used one or more of the devices as described in said Interrogatory III.

Answer: Interrogatory III having been answered in the negative, no answer is required to Interrogatory V.

## VI.

Interrogatory: If you have answered Interrogatory IV, as required, state the date or dates when



## Plaintiff's Exhibit No. 6—(Continued)

you made, used or sold one or more of the devices described in said interrogatory.

Answer: Apparatus such as described in answer to Interrogatory IV have been manufactured and sold by the defendants since the issuance of Ernst Patent Re-issue No. 22,740, April 2, 1946.

## VII.

Interrogatory: Attached hereto, and marked Plaintiff's Exhibit 1, is a photograph of a part of a sacking device, taken from one side of said device, showing a baffle plate or shearer of said device.

State whether you have made, used or sold a sacking device, prior to the filing of this suit, containing a baffle plate or shearer as shown in said Exhibit 1.

Answer: As nearly as defendants can determine from examination of the photographic Exhibit 1 attached to the Interrogatories, which photograph is not a complete disclosure of all the structural and operating parts, the answer is "yes."

## VIII.

Interrogatory: If your answer to Interrogatory VII is in the negative please attach a photograph or drawing to your answers to these interrogatories, showing the construction of the baffle plate or shearer of the sacking device or devices which you have made, sold or used since June 30, 1942, and explain said baffle plate or shearer.

Answer: Interrogatory VII having been an-

Plaintiff's Exhibit No. 6—(Continued)  
swered in the affirmative, no answer is required to  
Interrogatory VIII.

### IX.

Interrogatory: Attached hereto and marked Plaintiff's Exhibit 2, is a photograph of a part of a sacking device, taken from the side of the device opposite the side from which Exhibit 1 was taken and showing the baffle plate or shearer shown in said Exhibit 1.

State whether you have made, sold or used a sacking device containing a baffle plate or shearer as shown in said Exhibit 2.

Answer: From an examination of Exhibit 2 attached to the interrogatories, it appears that the declaratory part of Interrogatory IX is in error in stating that "Exhibit 2, is a photograph of a part of a sacking device, taken from the side of the device opposite the side from which Exhibit 1 was taken." It appears from the two photographs, Exhibits 1 and 2, that both are taken from the same side but that Exhibit 1 shows a part of one of the twin units above referred to and Exhibit 2 shows a part of the other of the twin units referred to. However, as nearly as defendants can determine from an examination of Exhibit 2, and qualified by the explanation that said photograph does not show all the structure of the device, it does appear to illustrate in part a device manufactured and sold by the defendants.

Plaintiff's Exhibit No. 6—(Continued)

X.

Interrogatory: If your answer to Interrogatory IX is in the negative please attach to your answers to these interrogatories a photograph or drawing showing the construction of the corresponding side of the baffle plate or shearer of the sacking device or devices which you have made, used and/or sold since June 30, 1942.

Answer: Interrogatory IX having been answered substantially in the affirmative, no answer is required to Interrogatory X.

XI.

Interrogatory: Attached hereto and marked Plaintiff's Exhibit 3-3 is a photograph of a portion of one side of a sack jigger showing the mechanism for vibrating or jiggling the platform for supporting the sacks.

State whether you have made, used or sold a sack jigger, prior to the filing of this suit, containing the mechanism for vibrating or jiggling the platform for supporting the sacks, as shown in said Exhibit 3-3.

Answer: As nearly as can be determined by defendants from an examination of the two photographs, both marked Exhibit 3, attached to the interrogatories, the defendants have made and sold an apparatus as illustrated therein.

## Plaintiff's Exhibit No. 6—(Continued)

## XII.

Interrogatory: If your answer to Interrogatory XI is in the negative, please attach to your answers to these interrogatories a photograph or drawing showing the construction of the mechanism for vibrating or jiggling the platform for supporting the sacks of the sack jigger which you made, used or sold prior to the filing of this suit.

Answer: Interrogatory XI having been answered in the affirmative, no answer is required to Interrogatory XII.

## XIII.

Interrogatory: If your answer to Interrogatory I is in the negative, identify each element or feature specified in said interrogatory that is absent from the sacking devices made, used or sold by you.

Answer: Inasmuch as Interrogatory I is in part a paraphrase of claim 1 of one of the patents in suit, namely, No. 2,288,159, but broadens the language of the claim, and inasmuch as defendants have described the essential elements of their apparatus and identified the same in the photographic exhibits, it is not feasible or pertinent to the issues to attempt to catalogue elements or features specified in plaintiff's interrogatories which are absent from the apparatus of the defendants.

## Plaintiff's Exhibit No. 6—(Continued)

## XIV.

Interrogatory: State where each specific element or feature of claim 1 of the patent in suit, No. 2,288,159, is disclosed in each item of the prior art to be relied upon at the trial, to the full extent that it will be contended that the prior art makes any such disclosure.

Answer: The prior art to the extent that the defendants now have knowledge of the same which will be relied upon at the trial is fully identified in defendants' First Amended Answer to Complaint. Inas much as the further inquiry in Interrogatory XIV is directed to argumentative matter, the defendants, unless otherwise directed by the Court, will defer explanation until the trial.

## XV.

Interrogatory: If your answer to Interrogatory III is in the negative, identify each element or feature specified in said interrogatory that is absent from the sack jigger made, used or sold by you.

Answer: Inasmuch as Interrogatory III is in part a paraphrase of claim 1 of Patent Re-issue No. 22,740, and inasmuch as defendants have described the essential elements of their apparatus and identified the same in the photographic exhibits, it is not feasible or pertinent to the issues to attempt to catalogue elements or features specified in plaintiff's interrogatories which are absent from the apparatus of the defendants.

## Plaintiff's Exhibit No. 6—(Continued)

## XVI.

Interrogatory: State where each specific element or feature of claim 1 of Patent, Re 22,740, is disclosed in each item of the prior art to be relied upon at the trial, to the full extent that it will be contended that the prior art makes any such disclosure.

Answer: The prior art to the extent that the defendants now have knowledge of the same which will be relied upon at the trial is fully identified in defendants' First Amended Answer to Complaint. Inasmuch as the further inquiry in Interrogatory XIV is directed to argumentative matter, the defendants, unless otherwise directed by the Court, will defer explanation until the trial.

## XVII.

Interrogatory: State what patents and/or publications will be offered in evidence at the trial by defendants to illustrate the prior state of the art.

Answer: The prior art to be relied upon at the trial, either for the purpose of anticipation or as illustrating the prior state of the art, is identified in the First Amended Answer to Complaint to the extent that defendants are now advised.

## XVIII.

Interrogatory: State who made the parts for the sacking devices, and/or attachments therefor, used



## Plaintiff's Exhibit No. 6—(Continued)

by defendants in their factory, and when they were made.

Answer: The defendants made the parts for the apparatus referred to in their own factory, except possibly for some minor standard hardware and excepting items such as electric motors, rubber belting and products generally obtainable upon the market.

## XIX.

Interrogatory: If the sacking devices and/or attachments therefor were constructed by defendants in their own factory give the names of the persons who assembled or constructed such devices and/or attachments.

Answer: The defendants personally and with the assistance of employees constructed the apparatus in question.

## XX.

Interrogatory: State who made the parts for the sack jiggers and/or attachments therefor used by defendants in their factory, and when they were made.

Answer: The defendants made the parts for the apparatus referred to in their own factory, except possibly for some minor standard hardware and excepting items such as electric motors, rubber belting and products generally obtainable upon the market.

## Plaintiff's Exhibit No. 6—(Continued)

## XXI.

Interrogatory: If the sack jiggers and/or attachments therefor were constructed by defendants in their own factory, give the names of the persons who assembled or constructed such devices and/or attachments.

Answer: The defendants personally and with the assistance of employees constructed the apparatus in question.

## XXII.

Interrogatory: State in detail the alleged intervening rights, alleged in Paragraph X of the Answer, to have accrued in favor of the defendants as against the plaintiff, between the date of the grant of the original Letters Patent No. 2,347,474 and the date of application of the alleged Re-issue Letters Patent No. 22,740, giving dates, names of places and names, and addresses of persons alleged to have established such intervening rights.

Answer: Particulars in respect to the intervening rights alleged in Paragraph X of the original Answer to Complaint and in Paragraph XIX of the First Amended Answer to Complaint to have accrued in favor of the defendants as against the plaintiff are not at present known to the defendants.

/s/ H. G. McBRIDE.



Plaintiff's Exhibit No. 6—(Continued)

State of California,  
County of Kern—ss.

H. G. McBride, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action; that he has read the foregoing Defendants' Answers to Plaintiff's Interrogatories, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

/s/ H. G. McBRIDE.

Subscribed and sworn to before me this 22nd day of December, 1948.

/s/ J. C. PENNER,

Notary Public in and for said County and State.

My Commission Expires March 5, 1949.

[Endorsed]: Filed December 23, 1948.

